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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 1450.

PUREX CORPORATION, LTD., and FIREMENS' MUTUAL INSURANCE COMPANY,
Petitioners,

vs.

ST. LOUIS NATIONAL STOCKYARDS COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable Supreme Court of the United States of America:

Respondent, St. Louis National Stockyards Company, respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in the above case. In this behalf, respondent shows the following:

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (App. p. 190 of Petition) not yet reported in any publication.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

I.

(a) Whether the decision of the United States Court of Appeals for the Seventh Circuit rendered in private litigation after reviewing exhaustive briefs on the subject was correct in stating that where the case has been transferred (under 28 U. S. C. 1404 a) from one District Court in one circuit to a District Court in another circuit and where no relief was sought in the transferring circuit and no motion for retransfer was filed in the transferee circuit, it has no jurisdiction to act on an allegation that the transferring court acted "on an insufficiency of evidence."

(b) Having waited until an adverse jury verdict had been returned against them, can petitioners require that their appeal be transferred from the Seventh Circuit to the Eighth Circuit Court of Appeals to review the evidence upon which the transfer was originally made when the record shows that no action was taken in either circuit critical of the transfer prior to the jury's verdict?

(c) Or, having taken no action until after an adverse jury verdict, can petitioners claim that they have been denied their constitutional rights of due process because their after-trial motion for review of the pre-trial order of transfer was denied?

II.

(a) Where, in a jury trial, the jury is informed that an affidavit has been filed listing some "to-odd" witnesses and the Trial Court permits cross-examination of the president of the defendant company concerning the affidavit, was the Court in error in refusing to permit counsel for the petitioners to read each name and address of the persons listed as a part of rebuttal evidence?

(b and c) Must the Trial Court be convicted of error when it refuses to permit the reading of a clause from defendant's answer which among other grounds says, "Further answering, this defendant states that the fire mentioned in plaintiffs' second amended complaint was an Act of God . . ."

ARGUMENT.

Petitioners seek review in this Court by the use of such shock words as fraud, false procurement and lying-match, hoping that by such words they can transform this well-decided case between corporations over a warehouse fire into an important case defining the Federal Rules. The petition should be denied.

Petitioners made no criticism of the Court's action on the rules until after the jury decided the case adverse to petitioners. Until then, no effort had been made to criticize the transfer of the case.

The fire giving rise to this cause of action occurred in National City, Illinois, which is adjacent to the City of East St. Louis, Illinois. The parties to the suit were all engaged in doing business in the State of Illinois. The law of the State of Illinois controlled the contractural agreements and the responsibilities of the parties. However, petitioners instituted their suit two and one-half miles from the court located where the cause of action arose, thereby selecting a forum for the trial of the case which was in a different Federal Judicial District and a foreign state. Upon motion to transfer being filed by the defendant in proper form with supporting affidavit, and in the absence of any contrary affidavits or suggestions from petitioners or either of them, the case was transferred from the Eastern District of the Eastern Division of Missouri to the District Court of the United States for the Eastern District of Illinois. No motion or request to retransfer was filed.

This transfer as suggested by petitioners' counsel may be the shortest on record, but it was not granted on the basis of the miles involved but rather on the more important factors that it inconvenienced neither party, and

placed the trial of the case where it properly belonged, in the Federal Court in East St. Louis, Illinois.

Prior to the enactment of 28 U. S. C. A. 1404 (a), the Court had held in the leading and often quoted case of **Gulf Oil Corporation v. Gilbert** (1947), 330 U. S. 501, 508, 509, 67 S. Ct. 839, 843, 91 L. Ed. 1055, that the very considerations presented in this motion to transfer were the most compelling reasons for exercising the older doctrine of forum non conveniens. It can be seen that most of the criteria were present in the motion for transfer presented here from this language in that case.

> "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not be imposed upon the people of a community which had no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems of conflict of laws and in law foreign to itself."

The suggestion that the forum where the cause of action arose is a matter which the trial Court should take into consideration is also suggested by Professor Blume in his article, "Place of Trial of Civil Cases," 48 Michigan L. Rev. 1, 37 (1949), where he suggests:

> "While it is never possible to say in advance what place will be convenient for the trial of a particular

case, if a general rule of convenience is to be made for all cases, the rule requiring trial where the cause of action arose has great merit."

In the rather recent opinion of **Van Dusen v. Barrack** (1964), 376 U. S. 612, the Supreme Court had occasion to review the soundness of the above-mentioned criteria, and while there were many complicating factors in that case not present in our case, it can be seen that the transferring court has wide discretion in the granting of the motion to transfer.

Petitioners take the narrow view that the case was transferred because of the number of witnesses suggested in the affidavit in support of the motion which completely overlooks the other significant reasons in the interest of justice for transferring the case back to the place where it could have been filed originally, a short distance, to the place where the cause of action arose.

The motion properly set out a number of persons who "may be required" (A. 5, 6). This motion was filed promptly upon petitioners' filing their complaint in the Federal Court in Missouri. At that time no depositions had been taken, no interrogatories had been filed. Quite obviously, all of the electricians would not likely be called as witnesses; normally not all of the firemen who were present fighting the fire would be needed as witnesses. The same observation is true of the other persons listed in the affidavit. Petitioners sought to make a point in the trial with the affidavit. First it was stated that the affidavit was being used to show that defendant did know the cause of the fire (A. 51). This was obviously incorrect. Then after establishing that the affidavit containing the list of "70-odd" persons had been filed (A. 54), no further questions were asked of the witnesses concerning it (A. 54). Later in the trial, in rebuttal, petitioners attempted to read the entire list of names

and addresses under the theory that they could then argue that important material information was being withheld. The court at that time refused this request. It is now argued that the Trial Court erred in this ruling and that error requires a new trial.

The cases cited by petitioners do not support this charge. Clearly the court was willing to permit the full development of the filing of the affidavit while petitioners were cross-examining the witness Novotny (T. 170), for at that time the court overruled respondent's objection, but petitioners' attorney asked no further questions concerning it.

Respondent took the position at trial and still contends that everyone who was in or around the warehouse at the time of the fire was produced as a witness. Respondent located and obtained as a witness the only truck driver who was at the warehouse at the time, Paul Gaffney (A. 70-72), who at the time of trial lived in Caldonia, Illinois, about three hundred miles from East St. Louis. This important independent witness was known to petitioners, for they had obtained a pre-trial statement from him (A. 72, Exhibit 21). Through extensive pre-trial discovery, petitioners know who the people on the scene were and had been furnished with the names of all employees and the list of all of the contents in the warehouse. It came, therefore, as no surprise that many of the persons listed on the affidavit could give no additional information and that at best their testimony would have been only cumulative to that of the persons who were on the scene at the time of the fire. Therefore, the court did not err in refusing to permit the reading of Exhibit 20, the list of names and addresses.

Respondent set out in its answer its affirmative defense as follows:

"10. Further answering, this defendant states that the fire mentioned in plaintiffs' second amended complaint was an Act of God and caused by no negligence on the part of this defendant, and further this defendant calls upon plaintiffs for strict proof of any negligence on the part of this defendant, and for strict proof of breach of any duty owed by this defendant to plaintiffs herein."

Petitioners sought to read only the following as an admission against interest (A. 90):

"Further answering, this defendant states that the fire mentioned in plaintiffs' second amended complaint was an Act of God . . ."

This alleged admission against interest it is argued conflicted with the position of the defendant at the time of trial.

We need no textbooks to define what is an Act of God and respondent did not, as the Trial Court informed counsel, contend that the fire was caused by "any lightning, earthquake or anything like that" (A. 90).

The court at this stage of the proceeding felt that this phrase was not proper evidence, and in view of the evidence which had preceded it that reading this phrase alone would not contribute to justice in the case. Petitioners argue that a Federal District Judge has no discretion in the matter and must permit counsel to read phrases from the pleadings to the jury. This position was refused below because to so argue would make our Federal Courts helpless in controlling evidence being offered.

CONCLUSION.

It is respectfully submitted that the matter raised by the Petition herein does not warrant further review of this case, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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